Rev— 2-3-81

Judge Davy

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 907.

THE UNITED STATES, APPELLANTS,

vs.

GEORGE W. ROSS.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 24, 1876.

Reversed

SUPREME COURT OF THE UNITED STATES

No. 907.

THE UNITED STATES, APPELLANTS,

vs.

GEORGE W. ROSS.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims.

Petition.—Filed Aug. 15, 1868.

GEORGE W. ROSS
vs.
THE UNITED STATES. } 3425.

To the honorable the Court of Claims:

The petition of George W. Ross, a citizen of the United States, residing in the State of Tennessee, showeth:

That on or about the seventeenth day of May, A. D. 1864, your petitioner was the owner and in possession of forty-four bales of cotton, weighing in the aggregate about twenty-two thousand pounds, and at the time aforesaid was stored with Elliott & Russell, at Rome, in the county of Floyd, State of Georgia; that on or about the day and date aforesaid, to wit, the seventeenth day of May, A. D. 1864, all of said cotton was seized and taken possession of by the military authorities of the United States, commanded by Generals Jefferson C. Davis and W. T. Sherman, without and against the consent of your petitioner; that said cotton was afterwards turned over to an agent of the Treasury Department of the United States, by whom said cotton was sold, and the net proceeds paid into the Treasury of the United States.

Your petitioner avers that he is unable to state the precise sum for which said cotton was sold or of the expenses attending its seizure, shipment, transportation, and sale, but he states on information and belief that said cotton was sold for eighty-five cents per pound, making the sum of eighteen thousand seven hundred dollars, and that the expenses of seizure, shipment, transportation, and sale did not exceed two
2 cents per pound, amounting to the sum of four hundred and forty dollars, leaving the net sum received from the sale of said cotton eighteen thousand two hundred and sixty dollars, which said sum has been paid into the Treasury of the United States.

Your petitioner further shows, that his said cotton was never abandoned or forfeited, nor was it in any way liable to confiscation under any of the acts of Congress in that behalf made and provided, and that it was not liable to seizure or capture under the laws of nations or the rules and usages of war; that no proceedings for the purpose of condemning said cotton have ever been instituted in any court or before any tribunal.

Your petitioner further shows, that if there has been a lawful capture and seizure of said cotton, which he is informed is claimed by the United States Government, he is nevertheless entitled to receive the net proceeds of said cotton, amounting to the sum of eighteen thousand two hundred and sixty dollars aforesaid, under the provisions of the third section of an act of Congress approved March 12, 1863, entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

Your petitioner further shows, that he has at all times borne true allegiance to the Government of the United States, and that he has not in any way voluntarily aided, abetted, or given encouragement or comfort to the recent rebellion, or to any other rebellion against the said Government of the United States.

GEO. W. ROSS.

McMINN COUNTY, *State of Tennessee:*

Personally appeared before me, Geor. W. Kinder, the undersigned, a notary public, George W. Ross, who, being first duly sworn, deposes and says that he is the claimant described in the within petition; that no assignment or transfer of said claim, nor of any part thereof, or any interest therein, has been made, except as in said petition stated; that he is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true.

GEOR. W. ROSS.

3 Subscribed and sworn to before me this 6th day of August, A. D. 1868.

G. W. KINDER,
Notary Public.

Address of claimant: Athens, Tennessee.
Address of claimant's solicitor: Geo. Taylor, 421 E street, Washington City D. C.

4 In the United States Court of Claims, December term, A. D. 1868.

GEO. W. ROSS
vs.
THE UNITED STATES. } No. 3425.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of eighteen thousand two hundred and sixty dollars, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne truth faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

T. LYLE DICKEY,
Assistant Attorney-General.

And for a further plea to the said petition the said defendants say, that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because they say that the said claimant did not, "within two years after the suppression of the late rebellion, prefer his claim to the proceeds" of the property mentioned and described, in the Court of Claims, as provided by the 3d section of the act of Congress approved March 12, 1863, and entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

T. LYLE DICKEY,
Assistant Attorney-General.

And for a further plea to the said petition the said defendants say, that the claimant ought not to have or maintain his aforesaid action against the said defendants, because they say that the said claimant, at the time of the filing of his said petition, was an alien, and that the said seizure and taking possession of the said property named in the said petition, and the said several acts and doings of the defendants, their officers, servants, and agents therein set forth, were made and done in the administration of, and in virtue and under color of, the act of Congress entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

Whereby and by virtue of the provisions of the act of Congress entitled "An act regulating judicial proceedings in certain cases, for the protection of officers and agents of the Government, and for the better defence of the Treasury against unlawful claims," approved July 27, 1868, the claimant is barred of his said action against the defendants.

T. LYLE DICKEY,
Assistant Attorney-General.

Filed July 19, 1869.

5 In the Court of Claims.

GEORGE W. ROSS
vs.
THE UNITED STATES. } 3425.

At a Court of Claims held at the Capitol, in the city of Washington, the 19th day of April, A. D. 1875, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant and do order, adjudge, and decree that the said George W. Ross, claimant, do have and recover of and from the United States the sum of fifteen thousand three hundred and fifty-six dollars seventy-eight cents, ($15,356\frac{78}{100}$,) being the net proceeds of thirty-one bales of cotton, at $495\frac{38}{100}$ per bale.

By the court:

A true copy of record.

6 In the Court of Claims of the United States, Dec. term, 1874.

GEORGE W. ROSS
vs.
THE UNITED STATES. } No. 3425.

From the judgment rendered in the above-entitled cause, on April 19, 1875, in favor of the claimant, the defendants, by their Attorney-General, on the 8th day of July, 1875, make application for and give notice of an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Asst. Atty.-General.

Filed July 17, 1875.

AT CHAMBERS.

Allowed.

C. D. DRAKE, *C. J.*

7 United States Court of Claims.

GEORGE W. ROSS
vs.
THE UNITED STATES.

Findings of fact and conclusions of law.

I. In May, 1864, the claimant resided in Athens, Tenn., where he continued to reside till October of that year, when he enlisted in the Army of the United States, and continued in its service until the end of the rebellion. At the same time, in May, 1864, he owned 31 bales of cotton, which were then in a warehouse in Rome, Georgia.

II. On the 18th of May, 1864, Rome was captured by the United States forces, and continued to be held by them till November of the same year. Shortly after the capture of the town the cotton was removed on Government wagons to a warehouse immediately adjoining, and upon the railroad leading to Kingston and Chattanooga. Subsequently all of the cotton in this last-mentioned warehouse was shipped on the railroad to Kingston. The railroad was in the possession of the military authorities. The time of the shipment from Rome is not shown; but it is shown and found by the court that cotton arrived in Kingston fromRome and was forwarded to Chattanooga at some time prior to the 19th August, 1864, and that on the 19th of August, 1864, the quartermaster at Chattanooga received from the quartermaster at Kingston 42 bales of cotton, which were shipped by him to the quartermaster at Nashville on the 21st August, and that on the 24th August 42 bales were received by the quartermaster at Nashville as coming from Kingston; and that these 42 bales were turned over to the Treasury agent and sold, the proceeds thereof being in the Treasury, and amounting to $20,806.09, and that no title has been asserted against these 42 bales by third parties.

And upon the foregoing findings of fact the Court of Claims decides the following as conclusions of law:

The capture of the claimant's cotton by the Army of the United States, and its shipment by them upon a railway in possession of the military authorities, followed by the receipt of cotton by the quartermaster at Nashville, coming by that railway from the place of capture, and its transfer to the agents of the Treasury, and the existence of an unclaimed fund in the Treasury arising therefrom, raises a presumption that the cotton taken from the claimant was a part of that transmitted and sold, and the burden of proof to defeat such presumption is upon the defendants.

NOTT, J., delivered the opinion of the court:

The facts in this case are: First, the capture of the claimant's cotton at Rome; second, a shipment of all cotton captured at the time and place upon a railway in the possession of and operated by the military authorities; third, the arrival of cotton from that vicinity in Nashville, and its transfer from the Quartermaster Department to the agents of the Treasury; fourth, a sale of the cotton thus transferred and an unclaimed fund in the Treasury. We think these facts entitle the claimant to the benefit of the legal presumption established by the Supreme Court in Crussell's Case, (7 C. Cls. R., p. 276.)

The cotton thus shipped to Nashville might have gone into any of three of the funds designated in Price's case, (7 C. Cls. R., p. 567,) viz:

into the second, the third, or the sixth. But against the second and sixth, judgments have already been recovered, (Hunt's case, 4 C. Cls. R., p. 438; Henry's case, 6 C. Cls. R., p. 389,) and against the third there is no claim known to the court. The precise amount of this fund has been differently stated by the Treasury at $20,806.09 and at $29,806.09, as shown in Price's case. We are inclined to think the latter a clerical error, from the excessive amount per bale which it would give to the 42 bales which it represents, and in the absence of explanation must restrict the recovery to the lesser amount.

The judgment of the court is, that the claimant recover the proceeds in the Treasury of 31 bales of cotton, being $495.38 per bale, amounting in the aggregate to $15,356.78.

DRAKE, Ch. J., did not sit in this case and took no part in the decision.

8 In the Court of Claims.

GEORGE W. ROSS
vs.
THE UNITED STATES. } No. 3425.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the Attorney-General for the allowance of an appeal, as filed in the clerk's office July 17, 1875, and of the order of the chief-justice of said court allowing the same; of the findings of fact by the court, and the conclusions of law thereon; and of the opinion of the court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this ninth day of September, 1875.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) No. 907. The UnitedStates, appellants, vs. George W. Ross. Court of Claims. Filed 24 January, 1876.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

THE UNITED STATES, APPELLANTS,
vs.
GEORGE W. ROSS. } No. 907.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

THE UNITED STATES, APPELLANTS,
vs.
GEORGE W. ROSS.
} No. 907.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

STATEMENT OF FACTS.

In May, 1864, the claimant resided in Athens, Tenn., where he continued to reside till October of that year, when he enlisted in the Army of the United States, and continued in its service until the end of the rebellion. At the same time, in May, 1864, he owned 31 bales of cotton, which were then in a warehouse in Rome, Ga.

On the 18th of May, 1864, Rome was captured by the United States forces, and continued to be held by them till November of the same year. Shortly after the capture of the town the cotton was removed, on Government wagons, to a warehouse immediately adjoining to and upon the railroad leading to Kingston and Chat-

tanooga. Subsequently all of the cotton in this last-mentioned warehouse was shipped on the railroad to Kingston. The railroad was in the possession of the military authorities. The time of the shipment from Rome is not shown; but it is shown, and found by the court, that cotton arrived in Kingston from Rome and was forwarded to Chattanooga at some time prior to the 19th August, 1864, and that, on the 19th of August, 1864, the quartermaster at Chattanooga received from the quartermaster at Kingston 42 bales of cotton, which were shipped by him to the quartermaster at Nashville on the 21st August, and that on the 24th August 42 bales were received by the quartermaster at Nashville as coming from Kingston; and that these 42 bales were turned over to the Treasury agent and sold, the proceeds thereof being in the Treasury, and amounting to $20,806.09, and that no title has been asserted against these 42 bales by third parties.

As conclusion of law, the court held that these facts raised a presumption that the cotton taken from the claimants was a part of that transmitted and sold, and that the burden of proof to defeat such presumption was upon the United States.

ASSIGNMENT OF ERRORS.

1. The court erred in holding that the facts found raised a presumption that the claimant's cotton was that which was sold and its proceeds paid into the Treasury.

2. There was error in its legal conclusion that the facts stated raised a presumption that the claimant's cotton was sold and its proceeds in the Treasury, which threw upon the Government the burden of proving the contrary.

3. Upon the facts found, the court should have ruled that they were insufficient in law to sustain the claimant's petition, and should have ordered its dismissal.

4. The court erred in ruling that the facts raised a legal presumption that the claimant's cotton was ever seized by authority of the defendants; or that it was ever taken for any other than a military use.

BRIEF.

If the claimant's cotton has been taken and converted by the United States, his *only* remedy or relief is that afforded by the captured and abandoned property act. (Opinion of this court in Haycraft *v.* United States, 10 Ct. of Claims Rep., 114; Kidd's case, 8 Ct. of Claims, 264.) The case, therefore, turns upon the true construction of this statute. (Act of March 3, 1863, c. 20, §§ 1 and 3, 12 Stats., 820.) The jurisdictional clause of the third section is this: "Any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the *proceeds* thereof, in the Court of Claims; and on proof to the satisfaction of said court of *his ownership of said property, of his right to the proceeds thereof*, and that he has never given any aid or comfort to the present rebellion, to receive *the residue* of such proceeds, after the deduction of any purchase-money which may have been paid, together with the expenses of transportation and sale of said property, and other lawful expenses attending the disposition thereof." The last sentence of the preceding section (§ 2) required that "all sales of such property shall be at auction to the highest bidder, and the *proceeds* thereof *shall be paid into the Treasury of the* United States."

Similar provision for the payment of the proceeds into the Treasury is found in the third section of the act of July 2, 1864, (13 Stats., 376.) The last section (§ 11, p. 378) authorizes "the Secretary of the Treasury, with the approval of the President, to make such rules and regulations as are necessary to secure the proper and economical execution of the provisions of this act, and shall defray all the expenses of such execution from the proceeds of fees imposed by said rules and regulations, of sales of captured and abandoned property, and of sales hereinbefore authorized."

If any cotton belonging to Ross ever came into the hands of any agent authorized to receive it, it was subsequent to the passage of these acts, and under their provisions. (Record, 4.)

Up to this time claimants have been held entitled to recover only such net proceeds of their cotton as are traced, directly or inferentially, into the Treasury of the United States. Such has uniformly been the effect heretofore given to these statutes by the Court of Claims, whose decisions upon this point we will examine, because it is the only tribunal having original jurisdiction over the subject-matter, and its course, guided by the supervisory power of this court, must very seriously affect the Treasury of the United States, from which the adoption as legal presumptions of the inferences in this case must draw very large sums. Among the earliest of these cotton cases brought before the court was that of Gaither *v.* United States, (3 Court of Clms., 193,) where the claimant was held entitled only to the proceeds actually in the Treasury, though these were greatly reduced by the *fraud* of the Treasury agents. See also Byrne's case, (*id.*, 195,) where the proceeds only,

irrespective of value, were allowed. In Geilfuss's case, (5 Ct. of Clms., 699,) they reiterate that "the claimant is entitled to judgment only for the net proceeds of the sale of his property *paid into the Treasury.*" Therefore, no award was made the claimant for that part of his captured cotton which was lost *in transitu* by a common carrier (the Illinois Central Railroad Company) in a loyal State, nor for that detained by the forwarding-house of Able & Co. (Terry's case, 8 Ct. of Clms., 277.) Upon page 288 of this volume is reported Spencer's case, now before this court upon appeal, where the Court of Claims again declare that the claimant cannot recover unless the proceeds of his cotton actually reach the Treasury, without regard to the question whether or not the failure to deposit them there was wrongful upon the part of the Treasury agent by whom the cotton was sold. Conformably to this, they ruled in Bynum's case (*id.*, 440) that where illegal expenses were allowed against the cotton, whereby the proceeds actually coming into the Treasury were correspondingly diminished, the owner is without redress against the Government. (Same in Dent's case, *id.*, 474.) In Cone's case, *id.*, 330, they state the law, as held by them, sustained (as they understand) by the approval of this court, thus: "We are of the opinion that the existence of the money in the Treasury, actually or constructively, is *a jurisdictional fact forming the very basis of the suit*, and that *it cannot be left to inference or presumption.* In cases where the property has been traced to a responsible officer of the Government, whose duty would have been to transmit it, and a fund has been shown to be in the Treasury which may have been derived, in whole or in part, from the capture, there the Supreme Court has held that a

legal presumption does arise which connects two established facts, viz, the fact of capture and the fact of a fund derived from captures. (Crussel's case, 7 Court of Clms., 276, and 14 Wallace, 1.) And this court has previously held the same. (Ake Henry's case, 6 Ct. of Clms., 389.) Beyond this we do not feel warranted in carrying the rule of legal presumption." (Cones *v.* United States, 8 Court of Claims, 330.)

What is meant by "constructively" in the Treasury is explained in the earlier part of the opinion by saying, "Where a fund has been held to be constructively paid into the Treasury, it has appeared that it was *lawfully* expended in the service of the Government;" citing Hudnal's case, (3 Ct. of Clms., 291.)

It is upon this ground, that the money must reach the Treasury, that the Court of Claims have adopted the course of calling the proceeds of captures made at a particular time and place a "fund," and dividing it among those proved to have had cotton taken at that time and place. (Mott's case, 3 Ct. of Clms., 363; Hayes's case, 4 *id.*, 489; Geilfuss's case, 5 *id.*, 697; Lynch's case, 6 *id.*, 246; De Bebians' case, *id.*, 377; Minor's case, *id.*, 393; Martin's case, 7 *id.*, 450; Price's case, *id.*, 567; Carroll's case, *id.*, 589; Sheppard's case, 8 *id.*, 456; Boyd's case, 9 *id.*, 420.) Sundry (68) cotton cases, 10 *id.*, 502, and that of George W. Ross, the present claimant, *id.*, 424, in which a *pro-rata* dividend of a certain alleged fund in the Treasury is awarded him, because the Court of Claims "think these facts [those set out in their finding, *supra*] entitle the claimant to the benefit of the legal presumption established by the Supreme Court in Crussell's case." (Record, 4.) We believe a wide difference can be shown between the case

at bar and that of Crussell. Crussell's cotton was proved to be in the hands of the quartermaster at Atlanta, who had charge of captured property there; that he shipped large quantities of captured cotton to Nashville, whence it was all forwarded to Cincinnati, sold there, and the proceeds paid into the Treasury. A witness, one Drake, testified that he was present at the sale, in Cincinnati, of what purported to be captured cotton, and identified by its mark the cotton of Crussell. The same witness also testified that cotton bearing the name of Silvey was sold at the same time and place; but this court were equally divided upon the question of Silvey's right to recover, his cotton not having been distinctly shown as coming into the custody of an officer specially charged with the care of captured property, though it did appear that Silvey reported his cotton to the quartermaster, (Captain Hade,) upon whom that duty devolved, was furnished with a pass to go and put it into shipping order, and that it was removed by men claiming to act under Hade's direction.

Mr. Ross makes out no such case. Shortly after May 18, 1864, when Rome, Ga., was captured by our forces, his cotton was removed, upon Government wagons, from the building where he had stored it to a warehouse near the railroad leading to Chattanooga via Kingston, that road being then under military control. It is evident from the findings that this warehouse contained other cotton. At some time—nobody knows (or states) when—its contents were all shipped to Kingston. The court finds that, at some equally indefinite time, (except that it was before August 19, 1864,) "*cotton*" (of unknown quantity, bales, marks, or ownership) "arrived at Kingston from Rome, and was forwarded to Chattanooga;"

whether it ever reached that destination or not does not appear. To say that it did, is the merest conjecture. "On the 19th of August, 1864, the quartermaster at Chattanooga received, from the quartermaster at Kingston, forty-two bales of cotton," which bales were shipped to the quartermaster at Nashville August 21, 1864, who received that quantity, as coming from Kingston, August 24, 1864, and they were turned over to the Treasury agent and sold, and the proceeds paid into the Treasury, where they remain unclaimed, unless they are claimed by this petition.

There is absolutely nothing but conjecture to establish any connection between Ross's 31 bales and the 42 bales shipped from Kingston in August, 1864; and a grossly improbable conjecture at that! How was Kingston situated? It lies a dozen miles east of Rome, and the branch road from Rome strikes the Great Western and Atlantic Railway at Kingston; so that the cotton coming over this little branch of a dozen miles or so was but a drop in the bucket to that which came over the trunk line extending via Atlanta to the sea-coast at Savannah and Charleston in one direction, and to Mobile and New Orleans in the other, with ramifications throughout the cotton States. Thus, Kingston was in the heart of the cotton country. That 31 bales were shipped from Rome some time between May and the middle of August, 1864, and 42 bales were received at Chattanooga from Kingston later in the latter month, would not seem to be sufficiently related facts to charge the United States with actually having the proceeds of these 31 bales in its Treasury. To do this, the capture of *the* cotton and the transportation and sale of *cotton* ought, at least, to occur in a sequence that renders a connection

between them more than possible, or simply probable, even; or else it ought to be distinctly traced, at least, until it reaches some official distinctly charged with such a disposition of it; but in the hasty summary which precedes the court's "conclusion of law" these important elements of time and space are entirely disregarded.

The case does not show that *the* cotton in the warehouse of the railroad was shipped before November, 1864, when the place was evacuated; only that *some* cotton went from Rome prior to August 19, 1864. The finding is merely that "subsequently" to the taking of the town the warehouse-cotton was sent to Kingston.

This indefinite word "subsequently" was used advisedly. These findings were carefully drawn, and left it thus vague as to the time of its being shipped, because the evidence on this point was even more uncertain.

In the Court of Claims, as in every other judicial tribunal, the plaintiff is to prevail, if at all, by proof corresponding with his allegations. That the Government is there always the party defendant, so far from abrogating this rule or weakening its application, is a reason for scrupulous care in its enforcement, since it has not the opportunity for rebutting the assertions made that individuals have in ordinary cases of contract, and it alone, by positive statute, is required to furnish to its opponents all the record-proof in its possession that may be asked for by them.

Without meaning to be technical, but merely to apply this fundamental proposition—the *first* laid down by Greenleaf—as a just test of truth, let us make that application in the present case; premising that it is even

more applicable to these than to ordinary causes, because the petitions are supported by the oaths of claimants, instead of being mere formal pleadings filed by counsel.

Mr. Ross alleged (Record, 1) that about May 17, 1864, he had *forty-four* bales of cotton stored in a building in Rome, Ga.; that it was then *all* seized by the United States military forces under Generals Sherman and Davis; that it was turned over to a Treasury agent, sold, and the net proceeds paid into the Treasury of the United States. That he cannot state "the precise sum for which said cotton was sold," but declared, on information and belief, that it was *eighty-five* cents a pound.

Professor Greenleaf gives the law relative to the materiality of statements of time, *quantity*, and value, thus: "In general" these allegations, "*when not descriptive of the identity of the subject of the action*, will be found immaterial, and need not be proved strictly as alleged." So, in an action of trover, the plaintiff's attorney may allege that his client casually lost a million or a thousand bales of cotton; or that he lost a large quantity, to wit, ten thousand bales, which the defendant found and converted to his own use; and the recovery will be for the quantity actually proved, however small. But where a claimant is stating his own case, under the sanction of an oath, and declaring just how many bales of cotton were taken out of his own actual custody, and he uses the unusual numbers of "*forty-four*" bales, sold at "eighty-five" cents, he must be supposed to state accurately the number of bales he owned and which were taken from him. Furthermore, the course of proof and reasoning in this case makes the allegation of quantity "descriptive of the identity of the subject." It was an

entire lot of *forty-four* bales, taken at Rome, in May, 1864, for which the claimant originally demanded payment. His claim is sought to be established by proof of the shipment of *forty-two* bales from Kingston in August, 1864. But the court below found the fact (Record, 4) that his lot only consisted of 31 bales; that he had overstated it 13 bales. If he had 44 bales, of which only 31 were taken by the soldiery or left Rome, how, when, and where did he lose the rest? If he never had but 31, faith cannot be put in him. If he had 44, why does he follow but 31 of them, since there is no shipment of just this number? The discrepancy between his petition and the proof shows that no reliance can be placed upon a mere *approximation* of numbers to establish the identity of a lot.

An unknown quantity was sent at an unknown time from Rome to Kingston. Eleven *more* bales than he owned, and two *less* than he claimed to own, were sent from Kingston to Chattanooga in August, 1864. Yet, upon these bald facts, the court below held that a presumption of *law* arises that this last shipment included Mr. Ross's cotton; and that they throw upon the Government the burden of disproving this *conjecture!*

We have presented this matter of the failure of the proof of quantity as it appears upon the record *here.* If recourse could be had to that of the case as made up below, we could show gaps in it much more serious, and palpably fatal. The findings of fact, loose, inconclusive, and disjointed as they are, are based upon evidence still more irrelevant, disconnected, and inconsequential; and, in many instances, though adduced by the claimant, repugnant to his claim.

Supposing that the present direct railway communica-

tion between Rome and Chattanooga did not then exist, but that the only mode of railroad transportation was via Kingston, that would make Rome an *entrepôt* for cotton to be shipped by rail from that region.

Who captured the town in which this cotton was stored? The petition states the historic fact that it was General Jeff. C. Davis's division of General Sherman's Army, in its pursuit of the retreating forces of Johnston southward toward Atlanta. Rome, on the Coosa River, was off the direct railroad line, and of no importance as a military post after it had lost its usefulness as a source of supplies to the rebels by the capture of its forts, guns, and stores, and the destruction of its mills and founderies. (Ann. Cyclopædia for 1864, page 74.) These, and not cotton, were the chief object of the diversion of troops from the proposed line of march, along the railroad toward Atlanta, to this town. Atlanta was occupied September 2, 1864. Between May and September of that year our Army under General Sherman was proceeding farther and farther south, and occupying wider and wider fields of operations. In doing so, large quantities of cotton came into the hands of the soldiery. Much of this was burned, necessarily or otherwise, in the destruction of mills, and other sources of supply. It was frequently used, at Kingston and elsewhere, for breastworks and other defensive structures. There was a large consumption by the soldiers in camp and hospital, as couches for the invalid or the well, to stuff saddles, and for the manifold uses of daily life to which it was appropriate. If needed for these purposes, the letter of the statute requiring it to be turned over was disregarded. So that the vague finding that the warehouse cotton (as well, doubtless, as that of many others) was

sent from Rome to Kingston, at some time or other; and that "cotton" was sent from Kingston to Chattanooga in August, 1864, proves nothing. The supply of this commodity reaching the railroad, at each of these points, during the summer of 1864, must have been considerable.

In Silvey's case, by a bare majority, the Court of Claims held that if the cotton was traced to the control of a quartermaster "*charged with the care of captured and abandoned property*," the legal presumption was that it was turned over to the Treasury agents, and that its proceeds reached the Treasury. (4 Court of Claims, 490.) Chief-Justice Casey and Judge Nott thought it must be traced, at least, into the hands of the Treasury agents, if not to the Treasury, by direct proof. Upon this issue the Supreme Court was equally divided. As before remarked, the testimony was very strong to show that Silvey's cotton was in fact sold at Cincinnati by a Treasury agent.

In Ake Henry's case, (6 Court of Claims, 391,) a quartermaster was found in charge of the cotton, with express instructions to forward it to Chattanooga; and it was deemed probable that cotton from unknown sources was that so forwarded; but, in both of those cases, there was no question as to the possession of the claimant's cotton by an officer whose special duty it was to forward it. In Crussell's case, (4 Court of Claims, 533,) the cotton was traced to Captain Hade, engaged in this service. Yet these, and other cases heretofore cited, show the gradual enlargement of the doctrine that substitutes an inferential conclusion for positive proof that the net proceeds of the claimed cotton were in the Treasury. This

is the first case in which it has been decided that transportation of cotton at indefinite times, in unknown quantities, under charge of no authorized officer, upon a wagon or railroad controlled by the military, would give a valid claim for the proceeds of a specific number of bales of cotton at a fixed price, as being part of that "unknown quantity." This legal conclusion is an inference, not from known facts, but from the unknown and hypothetical.

As another illustration of how these inferential presumptions grow in the mind which conceives them, let us look at the "conclusions of *law*," as stated by the Court of Claims, drawn from their "findings of fact." (Record, 4.)

They find, as *fact*, that after Rome was captured, Ross's cotton was hauled in Government wagons to a warehouse; that, some unknown time after, all the cotton in the warehouse in which it was at one time stored went to Kingston over a railroad controlled by the military, but for what uses does not appear. Thence, it is inferred, as a matter of law, that the capture and shipment was by that aggregation of muskets, &c., known as "the Army of the United States." The power to draw inferences grows by exercise. Next, it is stated as *law* that this shipment to Kingston was "followed by the receipt of [some] cotton by the quartermaster at Nashville;" omitting entirely the fact found that there was an interval of three months between the capture of Ross's 31 bales at Rome, and the receipt of *somebody's* 42 bales coming from *Kingston* to Nashville. *Crescit eundo.* The next "conclusion of *law*" is still more remote from the facts. The *facts* found were, that Ross's cotton was captured at

Rome; that the cotton received at Nashville came from Kingston; the cotton (whosever it was) shipped from Rome, via Kingston, being traced no *farther* north (at any rate) than Chattanooga, (really, not beyond Kingston,) and that received at Nashville no farther back than Kingston; but from these it is stated "as conclusion of *law*" that the cotton received at Nashville came "by that railway from the place of capture," was then turned over to the Treasury, and became the origin "of an unclaimed fund in the Treasury *arising therefrom*."

This comparison of fact and fancy shows that the last "conclusion of law"—*i. e.*, that the cotton transmitted and sold was presumably that of the claimant, and the burden of disproving this assumption was upon the Government—was drawn rather from the preceding "conclusions of law" than from the facts.

II.

Presumptions of law are divided by Greenleaf into two classes, conclusive and disputable. We hardly think it will be claimed that those said to arise in this case belong to the first class. Of the latter class the same writer says: "These, as well as the former, are the result of the general experience of a connection between certain facts, or things, the one being usually found to be the companion or the effect of the other. The connection, however, in this class, is not so intimate, nor so nearly universal, as to render it expedient that it should be absolutely and imperatively presumed to exist in every case, all evidence to the contrary being rejected; but yet it is so general, and so nearly universal, that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other, in the absence of

all opposing evidence. In this mode, *the law* defines the nature and amount of the evidence which it deems sufficient to establish a *prima-facie* case and to throw the burden of proof on the other party; and if no opposing evidence is offered, the jury are bound to find in favor of the presumption. A contrary verdict would be liable to be set aside, as being against evidence." (1 Greenl. on Ev., § 33.)

A presumption is the deduction of the fact decisive of the cause, as a conclusion from the facts proved. The jury may find either way upon presumptions of fact; but a legal presumption is the conclusion which the law peremptorily requires to be drawn whenever those facts appear which it declares the basis of that inference. To determine contrary to such a presumption is, of course, error of law.

Matthews says: "Presumptions of law are suppositions or opinions previously formed on questions of frequent occurrence—being found from experience to be generally accordant with truth—and remain of force till repelled by contrary evidence. Presumptions of fact are conclusions drawn from particular circumstances." (Matthews' Pres. Ev., 1.)

By recurring to the language of Cone's case, 8 Ct. of Clms., 333, previously quoted, the presumption supposed to apply here is discovered: "In cases where the captured property has been traced to a *responsible officer of the Government*, whose duty it would have been to *transmit* it, and a fund has been shown to be in the Treasury which *may* have been derived, in whole or in part, from *captures*, there the Supreme Court has held that a legal presumption does arise from two established facts, viz, the fact of capture and the fact of a fund derived from

captures." (8 Ct. of Clms., 330.) The defect in this statement, that it disclaims the necessity of any connection between the lot of cotton, the capture of which is the basis of action, and the fund derived from captures, has already been noticed. The subject to which attention is now called is that this supposed legal presumption is not imagined to arise except in the instance of property coming into the possession of a Government officer, upon whom rests the duty of its transmission, *i. e.*, a Treasury Agent or a quartermaster "charged with the care," &c., of captured property. As to *military* officers and to privates, the act under which the present action arises devolves upon them only the duty of turning over the property when called upon for it, and not of forwarding it, which would frequently be incompatible with more serious and urgent obligations. (12 Stats., 821, § 6.)

This inference of an official duty imposed by law and of its performance is the sole support of the plaintiff's claim; it can only stand by an application to the evidence of the maxim "*omnia præsumuntur rite esse acta;*" and if this application be not legally justifiable upon the state of facts disclosed, the case fails altogether. Best tells us that the true principle intended to be conveyed by this maxim is "that there is a general disposition in courts of justice to uphold official, judicial, and other acts, rather than to render them inoperative; and, with this view, where there is general evidence of acts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking, essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption rests solely on grounds of pub-

lic policy." (Best on Evidence, 468, § 353.) In a note (*q*) to this section he remarks that "if definitions are dangerous, universal propositions are not less so."

This maxim has generally been used to indicate that where the principal act is established, its incidents will be presumed; that whatever is shown to have been done, will be conceived to have been rightly done, as to its preliminaries, &c.

Here, for instance, the essential jurisdictional fact is the existence in the Treasury of a fund derived from *the* capture made when the plaintiff's cotton was taken. If that be proved, it will be assumed that it was fairly sold, that only just deductions were made, and that the balance is the correct "net proceeds" to be paid to the proper party. Such presumptions are made in *favor* of the officer, either where he is a party, or, as between third persons, where his action is incidently brought before the court; not as against him, to charge him in a suit defended by him with a liability which the plaintiff ought to prove affirmatively. Here, again, the distinction above indicated should be borne in mind. Ordinarily, the reception of the plaintiff's property by the defendant, coupled with a refusal to return it on demand, casts upon the latter the burden of accounting for his possession of and dealings with it. Here the mere fact of a possession of the cotton or of its conversion, throws no burden upon the Government, but only proof of a fund in the Treasury arising from its sale. The claimant must show, not merely that the United States is *somebody's* trustee, but that it is trustee of a *fund* of which *he* is the *cestui que trust*—not merely the seizor of cotton he formerly owned.

This maxim, "*omnia presumuntur rite esse acta*," cannot

arise as to *unknown* persons. Its application is to a deputy sheriff, a recording officer, a man known by name or station, who is charged with a duty. It cannot apply to that general body designated in this record as "the Army of the United States." No duty rested on that organization, as such, to forward captured cotton; nor on its soldiers, whether privates or officers, by reason of their enrollment and muster into service. It is a pretty fair presumption that the men who followed Sherman from Chattanooga to Savannah did their duty reasonably well. If they found a bale of cotton, and some sick or wounded comrade needed a bed, they made him one out of it. If they, upon some detached service, were threatened with assault, and had cotton in their control, they used it to stop bullets and balls, regardless of the owner's anxiety that its proceeds should reach the Treasury and be preserved for his benefit. The maxim, as now applied, would make it their duty to take the cotton from under the sick and dying to send it to a Treasury agent; to expose themselves, lest cotton should be injured; not to burn powder-mills, foundries, or saltpeter-works, lest this inflammable substance should perish in the conflagration. When the Army moved, stores and subsistence, arms and ammunition, must be left behind, that cotton might be forwarded. This *statute* does not require this. It commands no effort to save or transmit it; imposes no prohibition upon its use, but merely says that such as is found in military possession shall be "turned over" to the Treasury agent upon demand. The agent's authority shall not be met with refusal or neglect, and that is *all* it says. That's all the Crussell and Silvey cases held. It is not a capture, merely, that suffices to raise the presumption of a sale and of pro-

ceeds in the Treasury; but the *fact proved* that the cotton was in the hands of an officer whose duty it was either to sell or to transmit to the proper selling agent.

This presumption of the faithful performance of official duty certainly applies with as much force to those employed in the Treasury as to those in the military service. The statute (12 Stats., 820, § 3) required that "a book of accounts shall be kept, showing from whom the property was received, the cost of transportation, and the proceeds of the sale thereof." The best evidence of the receipt of any particular cotton by Treasury agents, and of the existence of a fund arising therefrom in the Treasury, is this book. If it contains no entry of any such facts in any given instance, the presumption is that there is no such fund there. The presumption that the Treasury officials did their duty is at least as strong as that military men, in the midst of an active campaign, like that before Atlanta, were either able or willing to forward all cotton in the towns occupied by our troops. There is no presumption of a *partial* performance of duty. If cotton is forwarded to, and is received by, Treasury agents, there is no *stronger* presumption, certainly, that they sold it and sent the proceeds to the Treasury, than that they kept the requisite account of such transactions. It may be a legal presumption that money is paid to him who is entitled to it; but where the payer is not only entitled to, but is required to take and give vouchers and keep accounts, there can be no presumption that he made the payment and did not take nor give the vouchers, nor keep the accounts.

The books of the Treasury are as available to the claimants as to the Government—exactly so—as the Court of Claims always call (under R. S., § 1076) for any

information claimants desire that is pertinent to the issue. It is only when this information is refused that the presumption of there being a fund in the Treasury arises, even if it could arise from such refusal, which this court has held not to be the case, (Hanson *v.* Eustace, 2 Howard, 653,) though it was ruled otherwise in England. (Attorney General *v.* Windsor, 24 Beavan, 679.)

An omission to produce these records, (had there been such omission, which the facts stated as to the 42 bales show was not the case,) which are equally accessible to both parties, raises no adverse presumption. (Scovill *v.* Baldwin, 27 Conn., 316.)

The best evidence is at the command of the claimant. He has either neglected to procure and produce it, or else it was found not to sustain his claim of a fund in the Treasury to which he is entitled. In either case his proof fails. (Brunswick *v.* McKean, 4 Maine, 510.)

The second fact, which the Court of Claims thinks brings the proof up to a satisfactory demonstration, is still more remarkable: the fact of a fund in the Treasury derived from [some] captures. That is, if the Treasury agents did not get Mr. Ross's cotton they did somebody's, the proceeds of which are not yet claimed, and, therefore, he might as well have it as anybody. If the bar of the statute of limitations is removed, we shall find claimants enough who can sustain their claims by much stronger evidence than Mr. Ross, to take three times the amount ever received into the Treasury.

EDWIN B. SMITH,
Assistant Attorney-General.

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Supreme Court of the United States.

No. 907.—(*Advanced.*)

THE UNITED STATES, APPELLANTS,

vs.

GEORGE W. ROSS.

Appeal from the Court of Claims.

STATEMENT OF CASE.

This action was instituted to recover the proceeds of forty-four bales of cotton belonging to claimant, and stored at Rome, Georgia, which was seized and taken possession of by the military forces of the United States, during the month of May, 1864. The testimony was incomplete, as to thirteen bales, and the claim was confined to thirty-one bales, shown to have been in the warehouse in Rome, at the time the Federal forces took possession of that place.

The following finding of fact and conclusions of law, by the Court of Claims, present the issues before this Honorable Court:

Finding of Fact and Conclusions of Law.

I. In May, 1864, the claimant resided in Athens, Tenn., where he continued to reside till October of that year, when he enlisted in the army of the United States, and continued in its service until the end of the rebellion. At the same time, in May, 1864, he owned 31 bales of cotton, which were then in a warehouse in Rome, Georgia.

II. On the 18th of May, 1864, Rome was captured by the United States forces, and continued to be held by them till November of the same year. Shortly after the capture of the town the cotton was removed on Government wagons to a warehouse immediately adjoining, and upon the railroad leading to Kingston and Chattanooga. Subsequently all of the cotton in this last-mentioned warehouse was shipped on the railroad to Kingston. The railroad was in the possession of the military authorities. The time of the shipment from Rome is not shown; but it is shown and found by the court that the cotton arrived in Kingston from Rome and was forwarded to Chattanooga at some time prior to the 19th August, 1864, and that on the 19th of August 1864, the quartermaster at Chattanooga received from the quartermaster at Kingston 42 bales of cotton which were shipped by him to the quartermaster at Nashville on the 21st August, and that on the 24th August 42 bales were received by the quartermater at Nashville as coming from Kingston; and that these 42 bales were turned over to the Treasury agent and sold, the proceeds thereof being in the Treasury, and amounting to $20,806.09, and that no title has been asserted against these 42 bales by third parties.

And upon the foregoing findings of fact the Court of Claims decides the following as conclusions of law.

The capture of the claimant's cotton by the army of the United States, and its shipment by them upon a railway in possession of the military authorities, followed by the receipt of cotton by the quartermaster at Nashville, coming by that railway from the place of capture, and its transfer to the agents of the Treasury, and the existence of an unclaimed fund in the Treasury arising therefrom, raises a presumption that the cotton taken from the claimant was a part of that transmitted and sold, and the burden of proof to defeat such presumption is upon the defendents.

ARGUMENT.

1st. The Court of Claims finds that the claimant was in the army of the United States.

2d. That in May, 1864, he was the owner of thirty-one bales of cotton, which was stored in a warehouse in Rome, Georgia.

3d. That Rome was captured by the United States forces on the 18th day of May, 1864, and was held until November, 1864.

4th. That shortly after the capture of the town claimant's cotton was removed in Government wagons from the warehouse where it was stored to a warehouse immediately adjoining the railroad leading to Kingston and Chattanooga; and that afterwards all the cotton in the warehouse on the railroad, to which this cotton had been removed, was shipped on the railroad to Kingston, the railroad being in the possession of the United States forces.

5th. It is further shown and found by the court that cotton arrived in Kingston from Rome, and was forwarded to Chattanooga at some time prior to the 19th day of August, 1864, and that on that day the quartermaster at Chattanooga received from the quartermaster at Kingston 42 bales, which were sent forward by said quartermaster, and finally reached Cincinnati, where it was sold, and the proceeds paid into the United States Treasury.

It seems to us that the findings of the Court of Claims leave no reason to doubt that the proceeds of the claimant's cotton went into the United States Treasury, and the judgment of the Court of Claims was correct. It is true we have not followed our cotton by ear marks directly into the Treasury, but the court finds that it belonged to us; was stored in a warehouse in Rome, from which it was removed by Government wagons to another warehouse on the railroad in possession of the United States forces, and that the said cotton was afterwards shipped on said railroad from Rome to Kingston, and thence by the quartermaster at that place to Chattanooga, and thence to Nashville and turned over to the Treasury agent and sold, and the proceeds paid into the Treasury. We think it a much stronger case than the Crussell case decided by this honorable Court.